



Public Safety Wireless Network

Saving Lives and Property Through Improved Interoperability

September 23, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
12th St. Lobby, TW-A325
Washington, DC 20554

Re: PSWN Program Comments to the Commission's Notice of Proposed Rulemaking, *In the Matter of Amendment to Parts 2, 73, 74 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482-488 MHz*, ET Docket No. 03-158 and MB Docket No. 03-159.

Dear Ms. Dortch:

On behalf of the Public Safety Wireless Network (PSWN) Program and pursuant to Sections 1.51 and 1.430 of the Commission's Rules, 47 C.F.R. §§ 1.51, 1.430 (2002), enclosed herewith for filing are an original and four (4) copies of the PSWN Program's Comments in the above-referenced proceeding. Kindly date-stamp and return the additional marked copy of this cover letter and filing to the person delivering it.

Should you require any additional information, please contact the undersigned.

Respectfully submitted,

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Utah Communications Agency Network
Executive Vice-Chair,
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Member,
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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Parts 2, 73, 74 and 90 of the)	ET Docket No. 03-158
Commission's Rules to Permit New York)	MB Docket No. 03-159
Metropolitan Area Public Safety Agencies)	
To Use Frequencies at 482-488 MHz)	
)	

To: The Commission

**COMMENTS OF THE PUBLIC SAFETY WIRELESS
NETWORK PROGRAM**

Filed by: The Public Safety Wireless Network Program

Date: September 23, 2003

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EXECUTIVE SUMMARY

The Public Safety Wireless Network (PSWN) Program submits the following Comments in response to the referenced Notice of Proposed Rulemaking (NPRM), which addresses a report submitted to the Federal Communications Commission (Commission) by the Police Department of the City of New York (NYPD) on December 5, 2002. The report focuses on the need to reallocate Channel 16, at 482–488 megahertz (MHz), from analog broadcast television (TV) service to support public safety communications in the New York City metropolitan area.

The Commission acknowledges the continuing need demonstrated by petitioners for spectrum in this band and proposes that granting permanent reallocation is in keeping with its responsibility to allocate spectrum to public safety communications and serves the public interest. In granting this Petition, however, the Commission proposes to apply its authority under Section 303 rather than the suggested approach proposed within the Petition, pursuant to Section 337(c). In doing so, the Commission defines the analytical criteria applicable to both sections.

The PSWN Program acknowledges and concurs with the Commission's decision to explore all permissible mechanisms under its authority to provide adequate spectral resources to support public safety communications. The PSWN Program contends, however, that the Commission must further refine the criteria it will apply when considering petitions under Section 303 to parallel more closely the comparable analysis pertaining to Section 337(c) reflected within this NPRM. By doing so, the Commission will effectively apply successful analysis techniques within largely similar contexts. It is important to note that formally

acknowledging such parallels does not necessarily ignore existing distinctions between these two sections pertaining to permanence. Therefore, the PSWN Program further recommends the Commission consider from the onset of any initial Section 337(c) petitions whether a permanent reallocation under Section 303 would be more appropriate. The result would be a more streamlined approach that considers and applies consistent analysis regarding these two viable alternatives. Moreover, this refined approach would be sufficiently broad to consider similar petitions in other geographic locations. Finally, by doing so, the Commission is responding to objectives stated in the Spectrum Policy Task Force Report that recommend that the Commission pursue all viable mechanisms in addressing public safety communications needs.

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**COMMENTS OF THE PUBLIC SAFETY WIRELESS
NETWORK PROGRAM**

1. The Public Safety Wireless Network (PSWN) Program¹ Executive Committee (EC) respectfully offers the following Comments in response to the Notice of Proposed Rulemaking (NPRM) adopted by the Federal Communications Commission (Commission) pursuant to ET Docket 03-158 on July 7, 2003.

I. INTRODUCTION

2. This NPRM² responds to a report submitted to the Commission by the Police Department of the City of New York (NYPD) on December 5, 2002.³ The report focuses on the need to

¹The PSWN Program is a federally funded initiative operating on behalf of all local, state, federal, and tribal public safety agencies. The Department of Homeland Security and the Department of Justice are jointly leading the PSWN Program's efforts to plan and foster interoperability among public safety wireless networks. The PSWN Program is a 10-year initiative that is an effort to ensure that no man, woman, or child loses his or her life because public safety officials cannot talk to one another.

² See NPRM, In the Matter of Amendment of Part 2, 73, 74 and 90 of the Commission's Rules to Permit New York Public Metropolitan Area Public Safety Agencies to Use Frequencies at 482–488 MHz, ET Docket No. 03-158, MB Docket No. 03-159, rel. July 10, 2003 (*NPRM*).

³ See *Report of the Police Department of New York City*, December 5, 2002 (attached to NPRM as Appendix B) (*Report*).

reallocate Channel 16, at 482–488 megahertz (MHz), from analog broadcast television (TV) service to support public safety communications in the New York City metropolitan area. The petitioners listed in the report make up the New York Metropolitan Advisory Committee (NYMAC). NYMAC emphasizes the urgent need to permanently reallocate Channel 16 to land mobile radio (LMR) service.

3. The Commission accepted the report as a petition for rulemaking⁴ and issued an NPRM to solicit comments regarding whether the Commission should permanently reallocate Channel 16 and the technical implementation of this proposal.⁵ The Commission notes that this action serves as proof of its commitment to “facilitate effective public safety communication and to promote interoperability.”⁶ The PSWN Program encourages the Commission to consider, and where possible, apply, analytical parallels between Sections 337(c) and 303 of its Rules. By exploring such parallels, the precedent established in this proceeding could serve as the first step in adopting a viable regulatory alternative for alleviating congestion for public safety users nationwide, and for satisfying the Public Safety Wireless Advisory Committee (PSWAC) Report recommendations for additional spectrum allocations to support public safety communications.⁷

II. STATEMENT OF INTEREST

4. As an entity dedicated to fostering public safety wireless communications interoperability throughout the Nation and at all levels of government, the PSWN Program is particularly

⁴ See NPRM, ET Docket No. 03-158, at para. 1.

⁵ *Id.*, at para. 7.

⁶ *Id.*, at para. 1.

⁷ See PSWAC Report, September 11, 1996, at p.3.

interested in assuring that local, state, and tribal agencies are provided with sufficient resources to carry out their primary mission in support of public safety, including adequate frequencies to serve law enforcement, fire and rescue, and other first responders. The PSWN Program is pleased to offer the following Comments in response to the Commission's proposed rulemaking. Specifically, the PSWN Program asserts that if framed within a well-defined construct, this precedent will provide local, state, and tribal public safety agencies with opportunities to obtain access to spectrum through permanent reallocation.

III. BACKGROUND

5. In 1995, the Commission responded to public safety spectrum requirements defined by the NYPD by granting a temporary waiver of Parts 2 and 90 of the Rules to allow the NYPD to use Channel 16.⁸ The Commission did so in recognition that New York City had “an urgent need for additional spectrum capacity” and that use of Channel 16 would address that need while also promoting regional interoperability.⁹ The Commission noted that severe spectrum overcrowding, consistent delays, and backlogs were jeopardizing critical public safety radio transmissions.¹⁰ Subsequent to that decision, the NYPD and related NYMAC agencies invested more than \$50 million in transmitters, antennas, repeaters, and nearly 25,000 portable and mobile radios.¹¹

⁸ See NPRM, ET Docket No. 03-158, at para. 2.

⁹ *Id.*

¹⁰ See Appendix B, at p. 2.

¹¹ See NPRM, ET Docket No. 03-158, at para. 3.

6. After 7 years, the NYPD submitted the above-referenced Petition to request permanent reallocation of the Channel 16 spectrum to public safety use through the waiver process pursuant to Section 337(c) of the Telecommunications Act of 1934 (the Act). In the Petition, the NYPD demonstrates several points, including: (1) the significant investment already made in reliance that this spectrum would and could meet the increasingly complex interoperability requirements across public safety agencies, (2) the successful use of this spectrum to date without interference to adjacent spectrum users, and (3) the need to clarify and protect the invaluable contributions to public safety represented by this allocation from other plausible applicants under present Commission Rules. The Commission acknowledged these arguments, accepted the Petition, and submitted the above-referenced NPRM for comment. Although petitioners sought a permanent waiver under Section 337(c), the Commission used this proceeding as an opportunity to demonstrate a viable alternative by granting the petition pursuant to authority granted under Section 303.

IV. DISCUSSION

7. The PSWN Program recognizes the continuing efforts of the Commission to meet its responsibilities to facilitate public safety interoperability. The events of September 11, 2001, as well as other large-scale crises, demonstrated the need for reliable access and sufficient communications for public safety personnel during major emergencies.¹² The aftermath of this tragedy demonstrated the urgent need to provide additional resources for emergency communications. The Commission recognizes that it has a responsibility to facilitate a response

¹² See Waiver of Parts 2 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482–488 MHz on a Conditional Basis, 10 FCC Rcd. 4466, 4468 (1995) (*Order*).

to this need and explored, within this proceeding, its authority to employ more than one mechanism to allocate spectrum for public safety communications. The PSWN Program supports the Commission's analysis and agrees that the authority granted under Section 303, as well as that found within Section 337(c), should be exercised to fulfill public safety spectrum shortfalls. The Commission's efforts are consistent with the Spectrum Policy Task Force (SPTF) Report¹³ recommendations that the Commission should pursue all alternatives to meet its obligation in providing essential spectrum to meet the needs and requirements of public safety communications.

A. Section 303 Provides a Viable Alternative Authority to Section 337(c) in Permanently Reallocating Spectrum to Public Safety Communications Needs

8. The 482–488 MHz band at issue in this proceeding is currently allocated to broadcast TV services. The Commission observes that although the petitioners accurately suggest the applicability of a Section 337(c) waiver, if that waiver were granted, the underlying allocation would still remain assigned to the broadcast TV service. Therefore, the Commission proposes to permanently reallocate this spectrum in that geographic area to public safety services pursuant to authority granted in Section 303 and consistent with the requisite public interest.¹⁴

9. The PSWN Program concurs with this analysis and suggests that the Commission should use this rulemaking as a means of providing clear and unambiguous criteria for use of Section 303 authority, which when met, would provide public safety organizations an alternative mechanism to address essential spectrum requirements. In the NPRM, the Commission offered

¹³ See Spectrum Policy Task Force Report (*SPTF Report*), ET Docket No. 02-135, November 15, 2002.

¹⁴ See NPRM, ET Docket No. 03-158, at para. 7.

criteria to consider when weighing whether and how it would apply its Section 303¹⁵ authority including—(1) Is a public safety organization(s) successfully using spectrum presently allocated under permissible waiver; (2) to what degree would the reallocation be in the public interest; (3) is spectrum available within the existing public safety spectrum bands for that geographic area; (4) in permanently reallocating the spectrum, would the Commission, in the instance at hand, provide relief to affected public safety agencies, better facilitate improved interoperability, and give due recognition to investments made during the organization(s) occupation of the spectrum in question; and (5) is there assurance that such reallocation would not cause harmful interference to other spectrum users or hinder the Commission’s efforts to realize the digital TV (DTV) transition. The PSWN Program acknowledges the Commission’s effort to frame the parameters broadly; however, it also recommends that the Commission consider and develop a clear structure, prioritizing the factors to be examined. For example, do all, or only some, of the criteria need to be met, and which ones are most critical? These specifics are needed in order for public safety organizations to better identify the extent to which this authority applies to their needs and geographic context. As noted more fully below, the PSWN Program proposes that common criteria in Sections 303 and 337(c) be more fully explored and, where appropriate, parallels drawn so that the Commission clarifies and harmonizes analysis between seemingly comparable allocation mechanisms.

10. The Commission seeks comment on its conclusion that permanent reallocation under Section 303 would address petitioners’ assertions regarding the unavailability of public safety spectrum in the New York City area.¹⁶ The PSWN Program concurs with the Commission’s

¹⁵ See 47 U.S.C. § 303.

¹⁶ See NPRM, ET Docket No. 03-158, at para. 7.

determination that the NYMAC agencies have provided reasonable and comprehensive support indicating that they meet Section 303 criteria as outlined by the Commission. Therefore, the PSWN Program agrees that Channel 16 should be permanently reallocated to public safety use, pursuant to Section 303. Moreover, the PSWN Program notes that the Commission has seen fit in the past to allocate this channel to public safety in other geographic regions indicating potential application to subsequent petitions.¹⁷ In this instance, NYMAC agencies have operated for 7 years under a valid waiver, invested heavily in infrastructure and equipment, and realized significant gains with respect to service and interoperability requirements. Additionally, NYMAC agencies can demonstrate there is no additional available spectrum within established public safety bands.

11. The Commission also bases its conclusion, in part, on the considerable financial investment of public safety agencies and their longstanding use of the spectrum. The Commission recognized that NYMAC agencies continue to face issues of spectrum congestion and potential interference, given the finite amount of public safety spectrum presently available. Investments made by the NYMAC agencies to more fully use available spectrum at their disposal are appropriate and reasonable based on the expectation that access to this spectrum will not be interrupted. The Commission seeks comment on its conclusions.¹⁸ The PSWN Program concurs with these conclusions and further contends that given the limited budgets of many public safety organizations, such investments reflect significant expenditures that can neither be recovered nor duplicated if the organizations were required to transition to other spectrum prior to the end of the procured equipment's lifecycle. Moreover, any withdrawal of allocated

¹⁷ See 47 C.F.R. § 90.303 at fn. 6 (indicating Channel 16 is available to Los Angeles for use by public safety users).

¹⁸ NPRM, ET Docket No. 03-158, at para. 8.

spectrum after such an investment would be contrary to the public interest, given public safety organization budgets are generated in large part from state taxpayer revenues.

12. Finally, the NYMAC maintains that reallocation of spectrum for public safety purposes has neither created interference, nor will it interfere with existing television stations or impede any subsequent efforts by the Commission to meet its obligations under the DTV transition.¹⁹ The PSWN Program has long maintained that interference protection for all radio services is important, and no public safety system should be built if interference is anticipated. The years of continuous and compatible use by NYMAC agencies of Channel 16 spectrum is testimony to the value of effective and non-disruptive public safety communications on this band. The PSWN Program further notes that reallocation of Channel 16 for public safety communications purposes should not be seen as a substitute for permanent nationwide access to the 700 MHz band by local, state, and tribal public safety agencies nationwide, but should be viewed as a complementary initiative to provide support in other bands where systems are already deployed.²⁰

B. The Commission Must Clarify Relevant Rules in Order to Ensure That Public Safety Receives the Highest Degree of Protection From Interference

13. In its Petition, the NYMAC notes that Section 73.6020 protects land mobile operations by not allowing interference from Class A TV stations to Channel 16 in New York City.²¹

¹⁹ See, e.g., In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television; Public Interest Obligations of TV Broadcast Licensees; Children's Television Obligations of Digital Television Broadcasters; [and] Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Interest Obligations, MB Docket No. 03-15, RM 9832, MM Docket No. 99-360, MM Public Docket No. 00-167, and MM Docket No. 00-168 (*Second Periodic Review*).

²⁰ See PSWN Program Comments, Second Periodic Review, April 21, 2003, at para. 14.

²¹ See NPRM, ET 03-158, Appendix B: *Report of the Police Department of the City of New York*, at p. 5.

NYMAC further notes that Section 73.6020 does not mention low-power TV stations, TV translators, or TV booster stations. NYMAC asks whether those entities must afford Channel 16 the same protection against interference, and the Commission seeks comments regarding whether Channel 16 should be subject to that same protection in the Rules.²² The PSWN Program cannot overstate the seriousness of harmful interference to public safety communications operations. When the reliability of public safety law enforcement, fire and rescue, and other first responders' communications is compromised, the ability to protect lives and property is diminished. This is particularly true in New York City, where frequencies are scarce, and spectrum use is high. Public safety users should be protected from debilitating forms of interference, and the Commission should take a proactive position to prevent situations similar to those currently being experienced in the 800 MHz band.

C. Petitioners Meet Criteria Pursuant to Both Section 337(c) and Section 303, and Therefore Must Be Granted Permanent Waiver or Reallocation

14. The Commission also seeks comment on the appropriateness of allowing for reallocation pursuant to a Section 337(c) waiver.²³ The Commission uses this Petition to clarify its authority under Section 303; however, it also acknowledges, through detailed analysis, that NYMAC has also met the five threshold criteria pursuant to Section 337(c).²⁴ These criteria are: (1) no other spectrum allocated for public safety uses is immediately available; (2) there will be no harmful interference to other spectrum users entitled to protection; (3) public safety use of the spectrum is consistent with other public safety spectrum allocations in the geographic area in question;

²² *Id.*, at para. 11.

²³ *See* NPRM, ET 03-158, at para. 12.

²⁴ *Id.*, at paras. 12–16.

(4) the unassigned frequencies were allocated for their present use not less than 2 years prior to the grant of the application at issue; and (5) the grant of the application is consistent with the public interest.²⁵ The PSWN Program continues to support the Commission's authority pertaining to petitions made under Section 337(c).²⁶ The Commission concludes that, in this instance, the petition would succeed when weighed by the criteria under Section 337(c). The petitioners have proven that no other spectrum is available and no harmful interference will result. Moreover, allocation of this spectrum is consistent with other public safety allocations in the New York City area. Finally, the petitioners used the unassigned frequencies for the requisite period, during which time they made tremendous investments in public safety communications, consistent with the public interest.

D. The Commission Must Clarify Criteria Pertaining to Section 303 by Recognition of Applicable Parallels With Section 337(c) in Order to Facilitate Discernable Application Between These Two Comparable Spectrum Allocation Alternatives

15. As described above, the Commission took the initiative within this proceeding to explore the viability of reallocating spectrum under both Section 303 and Section 337(c). With this in mind, the PSWN Program recommends that the Commission consider comparable circumstances in other geographic areas where spectrum not presently in use could support an equivalent reallocation to public safety communications. The Commission should also consider the extent

²⁵ 47 U.S.C. 337(c).

²⁶ See Comments to the Jersey City Police Department Amended Application and Waiver Request Pursuant to Section 337(C) of the Communications Act of 1934, as Amended, and Section 1.925 of the Commission's Rules to Operate a Public Safety Radio System Frequency Band 470-480 MHz in Jersey City, New Jersey, DA No. 02-2567, October 22, 2002; Comments to the Federal Communications Commission's Request for Comments, In the Matter of Syosset Fire District Request For Waiver of Section 22.621 of the Commission's Rule, DA No. 03-1948, June 23, 2003; Ex Parte Comments to the Federal Communications Commission's Request for Comments, In the Matter of City of El Segundo, California Request for Waiver of Section 22.621 of the Commission's Rules, DA No. 03-2061, July 21, 2003.

to which parallels can be drawn between the five criteria specified in Section 303 and those provided under Section 337(c). In so doing, the Commission would craft precise and objective parameters by which public safety organizations in other geographic locations could also petition for reallocation of comparable spectrum through Section 303. Moreover, as noted above, by applying the more definitive criteria in Section 337(c), the Commission would resolve many of the unanswered questions reflected in its existing analysis regarding the permanent reallocation of spectrum. Finally, by applying these criteria for review, the Commission could compare the factors present to previous Section 337(c) petitions as a yardstick to measure the viability of comparing the operative facts and record when analyzing Section 303 petitions.

16. The Commission's analysis within this proceeding clearly reflects common criteria between Sections 303 and 337(c). Specific common criteria between the sections include a focus on (1) the public interest, (2) spectrum unavailability, and (3) the potential for interference. The remaining criteria in the two sections each address use and duration, indicating common threads that could be drafted into revised analysis criteria for Section 303. The distinction between waiver and permanent reallocation would be retained in the two sections by harmonizing closely related alternatives and clarifying Section 303 analysis. In this way, the Commission could use established analysis and determinations that could also be applied by other petitioners when exploring spectrum alternatives for public safety communications.

17. In this NPRM, the Commission affirms that NYMAC's assessment meets the relevant criteria under Section 337(c). The PSWN Program concurs with the Commission's preference to

supersede Section 337(c) criteria to employ the broader Section 303 authority and analysis.²⁷

While Section 337(c) provides a means for temporary or permanent waiver of the Commission's Rules as applied to specific allocations, Section 303 would permit the Commission to wholly reallocate the spectrum to public safety use. The PSWN Program recommends that the Commission consider, from the outset, the alternative of applying Section 303 analysis to any 337(c) applications for which the threshold criteria are met. Permanent reallocation would allow public safety agencies to consider and implement long-term planning and greater investment in systems and interoperability measures, and realize improved protection of life and property. The result would address the public interest in realizing public safety communications in a more timely fashion by streamlining the Commission's analysis between these two comparable spectrum allocation alternatives.

V. CONCLUSION

18. The PSWN Program thanks the Commission for the opportunity to comment on this docket and acknowledges the contributions of those interested parties that have submitted their opinions in this rulemaking proceeding. In its report, the NYPD has demonstrated the thorough analysis necessary to justify a permanent waiver or reallocation, which requires assurance of non-interference and use of propagation modeling to determine the impact that use of this spectrum by land mobile radio systems would have on incumbent licensees. The Commission acknowledged the petitioners' contention that permanent reallocation of Channel 16 would best serve the public interest by enabling long-term planning, expanding the current investment in spectrum, and better protecting the public. The PSWN Program supports this finding and asserts

²⁷ See NPRM, ET 02-135, at para. 19.

that by examining all circumstances and alternatives, the Commission is effectively pursuing recommendations made in the SPTF Report to maximize the efficient use of spectrum.

19. By clarifying relevant criteria and subsequently following the precedent set in New York City, the Commission would further facilitate mission-critical operations by advocating reallocation of spectral resources in the public interest and designating available idle spectrum to support public safety communications. As this proceeding demonstrates, the Commission can achieve this goal of clear guidelines and analysis by exploring common criteria that exist between Sections 303 and 337(c). If these criteria are met, application of Section 303 authority will contribute to and promote optimal use of this spectrum and address the well-established need for additional public safety channels by providing for viable alternatives, particularly in major metropolitan areas around the Nation where spectrum is in shortest supply and greatest demand.

Respectfully submitted,



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Certificate of Service

**Before the
Federal Communications Commission
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To Use Frequencies at 482-488 MHz)	
)	

I, Robert L. Giarrusso, Associate, Booz Allen Hamilton, 8283 Greensboro Drive, McLean, Virginia, 22102-3838, hereby certify that on this date I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the Public Safety Wireless Network Program's Comments to the Commission's Notice of Inquiry, *In the Matter of Amendment of Parts 2, 73, 74 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482-488 MHz*, ET Docket No. 03-158 and MB Docket 03-159, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Fair Oaks, Virginia this September 23, 2003.



Robert L. Giarrusso

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